ROKIAH AMAT v. PEMBANGUNAN TANAH DAN PERUMAHAN SDN BHD & ANOR

COURT OF APPEAL, PUTRAJAYA
MARY LIM JCA
RHODZARIAH BUJANG JCA
HAS ZANAH MEHAT JCA
[CIVIL APPEAL NO: J-02(NCVC)(W)-1586-08-2018]
28 JULY 2021

LAND LAW: *Transfer – Sale and purchase of land – Purchase of property from vendor and co-vendors via power of attorney – Property formed part of undivided master title – Purchaser fulfilled obligations under agreement – Property registered in name of first respondent upon subdivision of master title – Vendor director of first respondent – Whether vendor breached sale and purchase agreement – Whether first respondent obliged to fulfil terms of agreement and ensure title issued to purchaser – Whether first respondent held land in trust for purchaser*

CONTRACT: *Agreement – Sale and purchase agreement – Purchase of property from vendor and co-vendors via power of attorney – Property formed part of undivided master title – Purchaser fulfilled obligations under agreement – Property registered in name of first respondent upon subdivision of master title – Vendor director of first respondent – Whether vendor breached sale and purchase agreement – Whether first respondent obliged to fulfil terms of agreement and ensure title issued to purchaser – Whether first respondent held land in trust for purchaser*

The appellant was the representative of the estate of her late mother, Asiah Yahya ('deceased'), who, prior to her demise, had filed a suit to assert her ownership over a piece of land ('said property'). The deceased purchased the said property from the second respondent and three others ('co-vendors') through their attorney, Syed Ali, *vide* a sale and purchase agreement dated 8 October 1967 ('SPA'). The said property, at the time of the 1967 agreement, was part of an undivided master title and was registered in the name of Kheng Hup Company Limited ('Kheng Hup'). On 18 May 1968, the first respondent acquired the land from Kheng Hup and upon the subdivision of the master title, the said property was registered in the first respondent's name on 20 November 2008. The deceased thus sued the respondents claiming that the second respondent was in breach of the SPA and was holding the said property as bare trustees following her full payment of the purchase price and that there had been a breach of that trust. It was also asserted that the first respondent was not a *bona fide* purchaser for value and that the first respondent had assumed title subject to her rights and interests, both beneficial and equitable. There were also allegations of fraud and misrepresentation that would defeat the respondents' title under s. 340 of the National Land Code. In defence, both the respondents contended that the

A claim was time-barred under the Limitation Act 1953. The first respondent denied all obligations and knowledge of the SPA, claiming that (i) there was no agreement between the parties; (ii) its title to the property was indefeasible; (iii) it only sought a copy of the SPA; and (iv) it had never acknowledged the appellant's rights or interests. The second respondent also B disputed the existence and validity of the SPA, contending that, at the material time of the agreement, the property did not exist as the master title had yet to be subdivided or individual titles issued. Individual titles were only issued later and it was only then that the property was issued directly in the name of the first respondent. Consequently, the second respondent C could not be in breach of the SPA. The existence of a bare trust was also denied with the second respondent contending that the other signatories to the SPA ought to have been sued. The High Court dismissed the appellant's claim. Hence, this appeal.

Held (allowing appeal; setting aside decision and order of High Court)
D **Per Mary Lim JCA (for the majority):**

(1) The perceived inconsistency between the intitulement and the statement of claim was unfounded. Order 15 r. 7(1) permits an amendment or substitution of a party who has passed away before the claim comes up for trial. Such an application may be made *ex parte* and the object of the E application is to ensure that the proceedings may still proceed or carry on despite the death of the party concerned. The only condition is that the cause of action must not have abated with death. This was not a case where the cause of action of the deceased abated upon her demise. Since the respondents withdrew their respective applications to set aside the F *ex parte* order granting the appellant the right to carry on the claim of the deceased, the decision of the Senior Assistant Registrar allowing the application by the appellant to substitute or take over the proceedings from the deceased, remained. The appellant clearly had the *locus standi*; more so when she was undeniably the daughter of the deceased and had G obtained the necessary papers to continue the action on her late mother's behalf; or for the estate of the deceased. (paras 27 & 29-31)

(2) The claim by the deceased was not about failure to pass title or passing a deficient or inadequate title. Her claim was that a term of the SPA had not been performed and the non-performance amounted to a breach of H contract. Under the SPA, there was no reference to the second respondent selling the said property as registered proprietor or that he was entitled to such status. Instead, all that it represented was that the second respondent was entitled to all that piece of land and it was that entitlement that the second respondent sold to the deceased. Whether I the second respondent was selling as an agent or for anyone's behalf or that Syed Ali signed under the power of attorney was irrelevant and had

no effect on the validity of the SPA. There was certainty as to the subject matter of the agreement and all the other elements for a formation of a valid agreement were fulfilled. Hence, the second respondent was not absolved from liability as a contracting party under the SPA, and his breach of cl. 4 was clearly proved on a balance of probabilities. (paras 45, 47 & 48)

(3) The SPA was clear in stipulating that the second respondent was entitled to the Estate (Taman Saujana) and the second respondent's obligations under the SPA was in relation to the individual title in the name of the deceased. It was evidently clear that the second respondent had failed to see to his obligation. When the individual title to the said property was issued, it was in the first respondent's name, contrary to what was agreed upon in the SPA. Recognising that breach, the second respondent took steps towards ensuring that it be transferred to the deceased, after she had paid for survey and the like. Yet, the title was not issued to her. It was in this respect that the second respondent was in breach of the SPA. (paras 51-54)

(4) Since the first respondent was registered as owner of the said property, it was plain that it held the said property in trust for the deceased who had paid in full for such purchase and the first respondent was obliged to fulfil the terms of the SPA and ensure that title was issued to the deceased, especially since the purchase price had long been settled in full. The entitlement of the deceased to the said property was reflected in her entry and possession of the said property, built upon it and stayed at the said property from the time of the SPA till to date. The second respondent and for that matter, neither the first respondent or even Kheng Hup ever sought to displace, evict or challenge the deceased/appellant's right to be on the said property. In the circumstances, the first respondent was clearly in breach of the trust when it failed to ensure that individual title was issued to the deceased. (paras 59, 62 & 63)

(5) Since the breach of cl. 4 of the SPA occurred when the individual title was issued to the first respondent instead of to the deceased, it was at that point that the breach occurred and the cause of action accrued. The claim of the deceased was filed in April 2015, clearly within the 12-year limitation period. (para 64)

Per Rhodzriah Bujang JCA (dissenting in part):

(1) The appellant was stated as 'suing as personal representative of the estate of Asiah binti Yahya' by reason of an *ex parte* order. There was no letter of administration or grant of probate issued to the appellant to administer the estate of the deceased. She produced an agreement prepared by a Syarie lawyer and executed by the deceased in the

appellant's favour less than two months before her demise. However, this was not a case between two competing claimants or beneficiaries to the property of the deceased which necessitated a determination by the Syariah Court on the legality of it. This was purely a case on the authenticity of the said agreement. There was evidence that the appellant had a beneficial interest in the property and the statement of claim must be amended to reflect that she was, by virtue of the *ex parte* order, a party to the action in place of the deceased. (paras 7 & 8)

(2) The documentary evidence intended to be used by the appellant at the trial were only obtained the day before their production in court and the appellant initially had no intention to produce them at the trial. These documents were not part of the documents discovered for trial and was therefore rightly rejected by the Judicial Commissioner ('JC'). However, in re-examination, the appellant was allowed to read the contents of the documents which were ruled inadmissible. Section 63(e) of the Evidence Act 1950 allows for such oral evidence to be given in respect of a document and s. 65(1)(a)-(g) laid out the circumstances when such secondary evidence 'maybe' admissible. Given that the said section uses the word 'maybe', the said circumstances are not mandatory. In the given circumstances of this case and as recorded by the JC, the said letters were raised in re-examination following the cross-examination of the appellant by the first respondent. Thus, it was safe for the court to take into account and to consider the aforesaid oral evidence of the appellant. (paras 11 & 12)

(3) The cause of action arose when the first respondent refused to transfer the title to the property to the deceased. The right of action accrued not from the date of the sale but when it was asserted and infringed by the opposing party. Here, the cause of action arose at the earliest by the date of the letter dated 17 October 2011, if not the letter dated 5 April 2014 from the appellant's solicitor, threatening legal action against both the respondents though it was addressed to the first respondent only. The 12 years limitation period thus began from that aforesaid date and since the action was filed in 2015, it was well within the limitation period provided by the law. (para 15)

(4) At the time of the execution of the SPA, none of the respondents were the registered owners of the lot, either singularly or jointly. The individual titles on the land were only issued on 2 March 2015. In fact, there was a unequivocal and clear admission by the second respondent that the said property had been sold to the deceased, of her proprietary interest in the land. The evidence supported not just the existence of a constructive trust but also that of estoppel by conduct. The fact that there was a change in the ownership of the first respondent was

immaterial because the trite principle in company law is that a body incorporated is a legal, *albeit*, an artificial person. Therefore, the first respondent should not be allowed to approbate and reprobate its action. Further, the omission of deed of assignment and an irrevocable power of attorney could not be raised against the deceased because these two documents were clearly stipulated in the SPA to be the responsibility of the vendors – not her's – so the non-fulfillment of the same could not be held against the deceased. (paras 16, 19, 23 & 24)

(5) Just by virtue of the second respondent's position in the first respondent company and being a named co-vendor to the SPA to sell the land, which was not even his to begin with and one where he was never in possession of, constructive trust did not arise at all. The second respondent had no beneficial interest in the land at all when the SPA was executed. The JC was therefore right to invoke the principle of *nemo dat quad non habet* in his favour. Hence, the claim against the second respondent should be dismissed. (para 27)

Case(s) referred to:

Abdul Rahim Sinon v. Pembangunan Tanah Dan Perumahan Sdn Bhd & Anor [2016] 1 LNS 1079 HC ***(refd)***

Ahmad Hussin v. Hjh Mek Hj Hussain [1972] 1 LNS 3 FC ***(refd)***

Al Rashidy Kassim & Ors v. Rosman Roslan [2007] 3 CLJ 361 FC ***(foll)***

Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd [1996] 2 CLJ 561 FC ***(foll)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(foll)***

He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal [2020] 7 CLJ 271 FC ***(foll)***

Karuppannan Ramasamy & Anor v. Elizabeth Jeevamalar Ponnampalam & Ors; Sundaram Marappa Goundan & Anor (Interveners); Raya Realti (Third Party) & Another Appeal [2009] 4 CLJ 225 FC ***(refd)***

Latifah Mat Zin v. Rosmawati Sharibun & Anor [2006] 3 CLJ 207 CA ***(dist)***

Ngan & Ngan Holdings Sdn Bhd & Anor v. Central Mercantile Corporation (M) Sdn Bhd [2010] 3 CLJ 818 CA ***(dist)***

Ooi Jim & Anor v. Ai Eit & Ors [1974] 1 LNS 108 FC ***(foll)***

Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC ***(refd)***

Royal British Bank v. Turquand [1856] 119 ER 886 ***(refd)***

Subramaniam NS Dhurai v. Sandrakasan Retnasamy & Ors [2005] 3 CLJ 539 CA ***(dist)***

Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(foll)***

Tan Ong Ban v. Teoh Kim Heng [2016] 3 CLJ 193 FC ***(foll)***

Legislation referred to:

Companies Act 2016, s. 471(1)

Evidence Act 1950, ss. 63(e), 65(1)(a), (b), (c), (d), (e), (f), (g)

Limitation Act 1953, s. 6(1)

National Land Code, s. 340

Rules of Court 2012, O. 15 r. 7(1)

For the appellant - Mohd Fairuz Abdullah; M/s Mohd Najid & Partners
For the 1st respondent - Wong Yen Chnan; M/s Han & Partners & Mohd Hanafi Basri; Jabatan Insolvensi, Malaysia
For the 2nd respondent - Yong How Kiat; M/s HK Yong

[Editor's note: For the High Court judgment, please see Rokiah Amat lwn. Pembangunan Tanah Dan Perumahan Sdn Bhd & Satu Lagi [2018] 1 LNS 1746 (overruled).]

Reported by S Barathi

JUDGMENT

Mary Lim JCA (majority):

[1] The appellant's late mother, Asiah binti Yahya ("Asiah") purchased the property where the family resides from the second respondent and three others way back in 1967 for RM2,450. The second respondent and three others sold the property using a power of attorney. At the material time of purchase, the property was part of an undivided master title. Despite having paid the purchase price in full and more, and despite having constructed the family home on the said property, the property was registered in the first respondent's name on 20 November 2008 when individual titles were issued. Asiah sued the respondents seeking to revoke the transfer and registration and to have the property registered in her name. The appellant's claim was dismissed. The appellant appealed.

[2] Partway through the hearing of this appeal, the first respondent was wound up. The hearing was then adjourned to enable the appellant to procure the necessary leave of the winding-up court to carry on with this appeal. While action in this regard was pending, the Covid-19 pandemic struck. Leave has since been granted and this is our decision.

[3] Upon hearing full submissions from the respective parties, we reserved our decision. On the day of decision, the appellant filed an application in encl. 51 to introduce broadly three fresh pieces of evidence in the form of cause papers in another set of court proceedings relating to the removal of caveat entered by the appellant. This application was triggered by a poser from this court on the status of the land. Upon hearing submissions, the application in encl. 51 was allowed with no order as to costs.

[4] The parties further addressed us on the effect of the fresh evidence, in particular in respect of the reliefs sought. The appellant decided to press only with reliefs in para. 23(1) and (2). This decision takes those submissions into account.

[5] Amongst the fresh evidence introduced is the search conducted at the Land Registry tending to show that the first respondent had sold the property in question together with 22 other lots to a company known as Q Development Sdn Bhd *vide* sale and purchase agreement dated 9 April 2018. Q Development

Sdn Bhd was subsequently registered as the new owner on 14 May 2018. The decision of the High Court dismissing the appellant's claim was made on 16 July 2018. The sale to Q Development Sdn Bhd does not appear to have been brought to the attention of the High Court then. In view of the current status of the property, the appellant pressed this court only for the reliefs in para. 23(1) and (2) in the event her appeal is allowed.

Facts Of The Claim

[6] As indicated at the outset, the appellant's late mother, Asiah entered into a sale and purchase agreement dated 8 October 1967 with the second respondent who together with Syed Jaffar bin Alwee, Syed Yahya bin Junid and Tengku Othman bin Abdullah agreed to sell property namely Grant 316246, Lot 29357 (Lot Private 452) then held under Lot 4648, CT No. 17421 ("said property") for the sum of RM2,450 ("SPA"). Pursuant to cl. 5 of the SPA, Asiah, as the purchaser was allowed immediate possession of the said property upon execution of the SPA.

[7] And, that was precisely what Asiah did; she entered into possession, built a permanent structure, a house upon the said property for about RM200,000 and she and the family has occupied the said property ever since. Asiah has also been paying the rates as imposed by the local authority.

[8] In 2010, through solicitors, the appellant's late mother inquired with the respondents about title to her said property. There was no response. Sometime in 2015, Asiah decided to do a search with the land office. The results yielded that title to the property was registered in the first respondent's name on 20 November 2008. The second respondent is a director in the first respondent company.

[9] Asiah sued the respondents claiming that the second respondent was in breach of the SPA, and further held the said property as bare trustees following her full payment of the purchase price and that there had been a breach of that trust. It was also asserted that the first respondent is not a *bona fide* purchaser for value and that the first respondent had assumed title subject to her rights and interests, both beneficial and equitable. There were also allegations of fraud and misrepresentation that would defeat the respondents' title under s. 340 of the National Land Code. In essence, Asiah asserted that the first respondent was aware of her presence on the said property, and that the first respondent was fully aware of the SPA or the circumstances of her purchase.

[10] Asiah sought several declaratory reliefs to the effect that the respondents hold the property as trustees and ultimately that the property should be transferred to her name. In short, Asiah was seeking to compel the respondents to complete the SPA.

[11] These were the principal defences apart from limitation that was relied on by both respondents. Both respondents claimed that the claim was time-barred under the Limitation Act 1953.

[12] The first respondent denied all obligations and knowledge of the SPA, claiming that there was no agreement between the parties; that its title to the property was indefeasible; that it only sought a copy of the SPA and had never acknowledged the appellant's rights or interests.

[13] As for the second respondent, he too disputed the existence and validity of the SPA, contending that at the material time of agreement, the property did not exist as the master title had yet to be subdivided or individual titles issued. When the master title was issued, it was issued directly to Kheng Hup Co Ltd who in turn transferred it to the first respondent on 18 May 1986. Individual titles were only issued later and it was only then, around 29 March 2000 that the property was issued directly in the name of the first respondent. Consequently, the second respondent could not be in breach of the SPA, especially cl. 4. The existence of a bare trust was also denied with the second respondent contending that the other signatories to the SPA ought to have been sued.

At The High Court

[14] Asiah's claim was filed on 7 April 2015. On 8 July 2016, before the trial began, she passed away. On 30 January 2018, the Senior Assistant Registrar allowed the appellant's application made pursuant to O. 15 r. 7(1) of the Rules of Court 2012.

[15] On the first day of trial, 4 February 2018, the respondents raised a preliminary objection on the order of 30 January 2018. Following the court's directions, formal applications (encls. 92 and 94) were filed seeking *inter alia* to set aside the order of 30 January 2018 and that all proceedings to date be nullified and the trial to begin afresh. The applications were heard on 29 March 2018. Meanwhile, the trial proceeded and the learned judge reserved decision on both encls. 92 and 94 to 31 May 2018, the same date as the date of decision of the appellant's claim.

[16] The appellant then filed an application to amend the statement of claim – encl. 102. After hearing the parties, the learned judge decided to fix 16 July 2018 for his decision on all three interlocutory applications as well as the substantive claim.

[17] On 16 July 2018, as set out at para. [46] of the grounds of decision, the learned judge:

(i) dismissed the appellant's claim;

(ii) struck out encls. 92 and 94 without costs after the respondents withdrew their applications; and

(iii) dismissed the appellant's application to amend the statement of claim *vide* encl. 102. A

[18] The appeal before us is only in relation to the dismissal of the claim.

[19] These are the reasons for the dismissal of the claim, and these reasons range from procedural to evidentiary, substantive terms of the agreement and even in the matter of reliefs. B

[20] Procedurally, the learned judge found there was a "radical departure" of the appellant's case from that which was pleaded and that there was no valid cause of action against the two respondents. In the learned judge's view, the intitulement reflected that the "plaintif dalam kes ini telah dipinda daripada Asiah binti Yahya kepada anaknya Rokiah binti Amat (mendakwa sebagai wakil diri kepada estet Asiah binti Yahya yang telah meninggal dunia pada 8 Julai 2016) melalui perintah mahkamah bertarikh 30 Januari 2018". However, the "plaintiff" failed to amend the pleadings when the court dismissed the application in encl. 102. Consequently, the learned judge found that the writ differed from the statement of claim and was in conflict with each other. In the learned judge's words, "plaintiff dalam kes ini adalah Rokiah binti Amat sedangkan butiran-butiran yang merujuk kepada plaintif adalah merujuk kepada plaintif yang asal iaitu Asiah binti Yahya". By way of an illustration, the learned judge pointed out at para. [59] that the SPA was not signed by the appellant but by Asiah. C D E

[21] The High Court further found the claim unenforceable against the first respondent on grounds of want of privity, that the first respondent was not a party to the SPA in which case the SPA is "null and void" and ineffective as against the first respondent. The master title also revealed that the first respondent procured title from Kheng Hup Co Ltd on 18 May 1968 and upon subdivision in 2000, Lot 29357 was issued directly to the first respondent and pursuant to s. 340 of the National Land Code, the first respondent's title to the property was indefeasible. This meant that the second respondent was never the registered owner of Lot 29357 at the time of the SPA on 8 October 1967. That being so, no trust could arise. F G

[22] At para. [75], the learned judge held that the sellers in the SPA "tidak layak di sisi undang-undang untuk menjual hartanah tersebut kepada Asiah binti Yahya kerana pada masa perjanjian jual beli tersebut ditandatangan Kheng Hup adalah tuan punya kepada hartanah tersebut". Relying on the Court of Appeal decisions of *Ngan & Ngan Holdings Sdn Bhd & Anor v. Central Mercantile Corporation (M) Sdn Bhd* [2010] 3 CLJ 818; [2010] 1 MLJ 822 and *Subramaniam NS Dhurai v. Sandrakasan Retnasamy & Ors* [2005] 3 CLJ 539; [2005] 6 MLJ 120, the High Court held that the second respondent was not capable of giving a better title than what he had – *nemo dat quod non habet*, that since the second respondent had no power in respect of or any interest in the land, he was incapable of passing any to the appellant. H I

[23] The High Court was also of the view that the full payment of the purchase price for the property was immaterial because the first respondent obtained the master title to the lands which included the property, directly from Kheng Hup Co Ltd. The appellant had failed to produce evidence tending to show that that transfer was facilitated by or was through the use of the purchase money, whether from the second defendant or the appellant's late mother and as such there was no trust, let alone breach of trust and/or fraud – see paras. [84] and [91].

[24] At para. [92], the learned judge found the SPA to be a conditional agreement and that since the appellant had not led evidence to show that the conditions precedent had been fulfilled, the order of specific performance cannot be ordered. At para. [94], the High Court found that the appellant had failed to prove that an irrevocable power of attorney and a deed of assignment had been prepared and signed by the parties in accordance with cl. 4 of the SPA. The learned judge added that the appellant had also failed to prove that payment in full had been made, that the receipts issued were not of the first respondent.

[25] The High Court further found the claim time-barred.

Decision

[26] Let me deal first with the procedural aspects of the claim; whether there was inconsistency between the intitulement in the writ and the statement of claim following the application to substitute allowed by the court on 30 January 2018; and whether the appellant has *locus standi*.

[27] The *ex parte* application made by the appellant to substitute or to take over the proceedings from Asiah was entirely due to the demise of Asiah. The application (encl. 75) was made pursuant to O. 15 r. 7(1) of the Rules of Court 2012 and it was allowed by the learned Senior Assistant Registrar. That order of 30 January 2018 remains valid and effective as the respondents withdrew their application to set aside the said order.

[28] Order 15 r. 7(1) of the Rules of Court 2012 reads as follows:

> **7. Change of parties by reason of death**
>
> (1) Where a party to an action dies or becomes bankrupt but the cause of action survives, the action shall not abate by reason of the death or bankruptcy.
>
> (2) Where at any stage of the proceedings in any cause or matter the interest or liability of any party is assigned or transmitted to or devolves upon some other person, the Court may, if it thinks it is necessary in order to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, *order that other person to be made a party to the cause or matter and the proceedings to be carried on as if he had been substituted for the first-mentioned party.* An application for an order under this paragraph may be made *ex parte*.

(3) An order may be made under this rule for a person to be made a party to a cause or matter notwithstanding that he is already a party to it on the other side of the record, or on the same side but in a different capacity; but:

(a) if he is already a party on the other side, the order shall be treated as containing a direction that he shall cease to be a party on that other side; and

(b) if he is already a party on the same side but in another capacity, the order may contain a direction that he shall cease to be a party in that other capacity.

(4) The person on whose application an order is made under this rule shall, unless the Court otherwise directs, serve the order on every other person who is a party to the cause or matter or who becomes or ceases to be a party in accordance with the order, and serve with the order on any person who becomes a defendant a copy of the writ or originating summons by which the cause or matter was begun.

(5) Any application to the Court by a person served with an order made *ex parte* under this rule for the discharge or variation of the order shall be made within fourteen days after the service of the order on that person. (emphasis added)

[29] It is quite clear that O. 15 r. 7(1) permits an amendment or substitution of a party who has passed away before the claim has come up for trial. Such an application may be made *ex parte* and the object of the application is to ensure that the proceedings may still proceed or carry on despite the death of the party concerned. The only condition really is that the cause of action must not have abated with death.

[30] That is not the case here, and it is not the suggestion of any of the respondents that Asiah's cause of action abated upon her demise. And since the respondents withdrew their respective applications to set aside the *ex parte* order granting the appellant the right to carry on Asiah's claim, the decision of the learned Senior Assistant Registrar, remains.

[31] The perceived inconsistency between the intitulement and the statement of claim is in fact unfounded. Because the application is simply to substitute and allow someone to step into the deceased party's litigation shoes, and in this case, the unabated cause of action rightly devolves to Asiah's estate, the statement of claim necessarily maintains the claims of the deceased. Thus, the appellant clearly has *locus standi*; more so when she is undeniably Asiah's daughter and she has obtained the necessary papers to continue the action on her late mother's behalf; or for the estate of Asiah. The High Court was thus plainly in error in finding that there were inconsistencies between the pleadings.

[32] Insofar as the substantive claims against the two respondents are concerned, I find that the High Court had not appreciated and properly evaluated Asiah's claim. Instead, what the High Court did was to evaluate the claim through the lenses of the respondents. It is Asiah's claim which must be the forefront of the learned judge's considerations, whether she had discharged her burden on the balance of probabilities.

[33] Asiah's claim against the respondents emanates from the SPA and the subsequent conduct and holding out of the respondents.

[34] I shall deal with the claim against the second respondent first. In a nutshell, Asiah's claim against him is that by virtue of the SPA dated 8 October 1967, Asiah bought the land identified as Grant 316246, Lot 29357 (Lot Private 452), Mukim Plentong, Daerah Johor, Negeri Johor Darul Takzim which was then part of a larger lot held under Lot 4648, Certificate of Title No. 17421. She fully paid over the purchase price of RM2,450.

[35] As envisaged under cl. 5 of the SPA, Asiah entered into possession and enjoyed all benefits derived therefrom including building the family home. This was in 1967 and there are photos produced in court testifying to that fact. At any rate, this is not disputed by the respondents. Since then, Asiah had been settling the quit rent and whatever dues as imposed by the local authorities and though the documents were not marked as exhibits or even addressed in the written grounds, I am of the firm view that these pieces of evidence were already properly before the court and ought to have been admitted. These pieces of evidence support the contentions of the appellant that she had been in occupation, without issue, especially from the respondents.

[36] Asiah's claim against the second respondent is multi-fold.

[37] At the first level is the claim in contract, that there is a breach of cl. 4 of the SPA for not ensuring that title, when issued by the relevant authorities is issued to her – see para. 12 of the statement of claim at p. 23 record of appeal vol. 1.

[38] At the next level, she takes the position with her full payment, the vendors under the SPA, and that includes the second respondent, agreed to transfer the said property *vide* the first respondent's solicitors' letter dated 8 October 2010 but till to date has failed, neglected and/or refused to take such steps to complete the transfer of the said property as promised – see para. 13 of the statement of claim. Since she has paid fully paid the purchase price under the SPA and has entered into possession and occupation of the said property, the respondents thus hold the said property as bare trustee for her interest until the transfer and registration into her name has been completed. Clause 4 of the SPA and the trust was breached when the title, once issued, was registered in the name of the first respondent and not in her name – see paras. 14 and 15 of the statement of claim.

[39] Asiah's further allegation is that the second respondent is privy to fraud and/or misrepresentation and this defeats the first respondent's title under s. 340 of the National Land Code. The particulars relate, amongst others, to the knowledge of the SPA and her presence on the said property. This allegation does not appear to have been pursued at trial and submissions; hence will not be addressed in these grounds.

[40] Clause 4 of the SPA reads as follows:

> 4. Upon payment of the whole of the balance of the purchase price in manner aforesaid the Vendor shall execute in favour of the Purchaser/s or his/her/their nominee or nominees a proper and registrable transfer of the new document of title then issued by the Land Office in respect of the said land but in the event the new document of title shall not have been issued to the Vendors by the Government of the State of Johor in respect of the said land at the time when all the instalment have been paid by the Purchaser/s the Vendor shall in such case execute in favour of the Purchaser/s a Deed of Assignment, an irrevocable power of attorney whereby the Vendor shall transfer and assign all rights, title and interest in the said land to the Purchaser/s and also thereby the Vendor shall appoint and constitute the Purchaser their true and lawful attorney/s to deal with the said land as if he/she/they were the absolute owner/s thereof pending the issuance of a new document of title and in particular to execute and perfect a transfer of the said land and effect the registration thereof in accordance with the provisions of the National Land Code when the new document of title in respect of the said land is issued by the Government of the State of Johor.

[41] The second respondent's defence is that there is no breach of the SPA and denies the existence of any trust relationship, all for the same reasons, namely because the title was issued directly from the previous owner, Kheng Hup Co Ltd to the first respondent on 18 May 1968 without any individual titles being issued out. When individual titles were issued, the individual title for the said property was issued on 29 March 2000, directly in the first respondent's name. The titles were never issued to him. Consequently, Asiah had no cause of action against him.

[42] At para. 8, the second respondent made this defence:

> 8. Perenggan-perenggan 14 dan 15 Pernyataan Tuntutan adalah dinafikan … Selanjutnya, mahu Defendan Ke-2 atau pun pihak-pihak lain yang dinamakan di situ tidak pernah menjadi pemilik berdaftar tanah di bawah hak milik induk atau Lot 29357; dan selanjutnya, pada tarikh perjanjian jual beli dan/atau pembayaran harga belian yang dikatakan, tanah yang dipegang di bawah hak milik induk belum dipecah-sempadan (sub-divided) dan hak milik berasingan untuk Lot 29357, mahupun Geran 316246 atau pun hak milik sementara sebelum itu, tidak wujud sama sekali.

[43] It was this defence that found favour with the High Court. The High Court addressed this issue at paras. [66] to [78]. Essentially, the High Court found that the master title was transferred from Kheng Hup Co Ltd on 18 May 1968; that master title (CT No. 17421, Lot 4648 Mukim Plentong, Johor Bahru) was subdivided on 29 March 2000 and individual title GRN 316246, Lot 29357, HSD 301991 was issued on 20 November 2008. At no time did any of these titles described the second respondent as the registered owner, that in fact the second respondent had testified that he was not in the position to purchase the master title from Kheng Hup Co Ltd; that at the time of the SPA on 8 October 1967, title was with Kheng Hup Co Ltd (para. [74]) and title was only transferred to the first respondent on 18 May 1968.

[44] At para. [75], the High Court held that the vendors under the SPA were not entitled in law to sell because at that material time, Kheng Hup Co Ltd was the registered owner of the said property. The principle of *nemo dat quod non habet* as explained in *Ngan & Ngan Holdings Sdn Bhd & Anor v. Central Mercantile Corporation (M) Sdn Bhd* [2010] 3 CLJ 818; [2010] 1 MLJ 822; and *Subramaniam NS Dhurai v. Sandrakasan Retnasamy & Ors* [2005] 3 CLJ 539; [2005] 6 MLJ 120 was then applied; that the second respondent could not "give a better title than he had; that since he was not the registered owner of the said property, he was never in a position to give the said property".

[45] In my view, this analysis misses the whole point in Asiah's claim and thus the appellant's case. Asiah's claim is not about failure to pass title or passing a deficient or inadequate title. Her claim is that a term of the SPA has not been performed and that non-performance amounts to a breach of contract. It is about not completing the transaction as promised under the SPA. The claim is not about Asiah acquiring a lesser title or interest in the said property. It is about breach of a material term of the SPA which she wants enforced; and the SPA is an agreed document in Part A of the bundle of documents at trial. This is where I return to the remarks made earlier about the failure of the learned judge to appreciate and properly evaluate Asiah's claim. Had the learned judge done that, as a reasonable judge in similar circumstances would do, the learned judge would have found that there was a clear breach by the second respondent of cl. 4.

[46] Under the SPA, the second respondent together with three others described themselves as "vendors" who are "entitled to all that piece of land (hereinafter referred to as "the estate") situated in the Mukim of Plentong in the District of Johore Bahru in the State of Johore containing the approximate area of 160 acres 0 rood 20 poles which said land known as Lot No. 4648 is comprised in and held under State of Johore Certificate of Title No. 17321 which said estate shall hereafter be known as "Taman Saujana"."

The preamble of the SPA goes further to add that the "subdivision of the estate in accordance with the layout as shown in the vendor's estate plan (a copy whereof is annexed hereto) has been approved in principle by the State Planning Officer Johore". A

[47] There is no reference to the second respondent selling the said property as registered proprietor or that he is entitled to such status. Instead, all that it represents is that the second respondent is entitled to all that piece of land which ultimately forms Taman Saujana. It is that entitlement that the second respondent sold to Asiah for RM2,450 which was fully paid. The fact of payment and its receipt by the second respondent as stated in cl. 2 of the SPA is also not in dispute. B C

[48] There is certainty as to the subject matter of the agreement and all the other elements for a formation of a valid agreement are fulfilled. The object and consideration of the SPA are not wanting nor is there even a suggestion that it is invalid against public policy, which is far from being the case. The parties, especially the second respondent and Asiah were in no doubt as to the intent of their agreement and more particularly, as to what was being sold, that is, the said property as identified in the layout attached to the SPA. The details and the fact that the said property had yet to be excised from the master title, regardless who owned it at the material time, were all recognised at the time of agreement; hence cls. 3 and 4 of the SPA. Most importantly, the second respondent never denied the SPA. His oral testimony in court attests to that. On the contrary his evidence is in full support of the Asiah's claim, but this was not taken into consideration at all by the High Court. D E

[49] In his examination-in-chief, the second respondent testified that he entered into the SPA upon the instruction of the first respondent to sell the said property to Asiah. The fact that the SPA was signed by one Syed Ali under power of attorney does not seem to be of any concern to anyone; least of all, the respondents who actually admit to the existence of the SPA but challenged it for the reasons as described above. In my view, that is rightly so. Whether the second respondent was selling as an agent or for anyone's behalf or that Syed Ali signed under power of attorney is irrelevant and has no effect on the validity of the SPA. The second respondent is not absolved from liability as a contracting party under the SPA, and his breach of cl. 4 is clearly proved on the balance of probabilities. F G

[50] The matter of who the registered owner is at the time of the sale is immaterial or even the fact that the second respondent never became the registered owner of the said property too, is also immaterial. How the said property was described in relation to the master title or the estate also does not diminish the validity of the SPA as it is certain and plain what the subject matter of the sale was and is; similarly, the intent of the parties. H I

[51] This is because the SPA is not a sale by a party or person holding out that it is selling in such capacity and seeking to transfer such title or ownership. The SPA is clear in stipulating that the second respondent is entitled to the estate (Taman Saujana) and the second respondent's obligations under the SPA is in relation to individual title in Asiah's name.

[52] However, the SPA recognised that there is as yet title to be issued or properly deduced (see cl. 3), and so the second respondent agreed that when title is finally issued, especially individual title, he will ensure that such title is issued to Asiah at his/vendors' expense and efforts – see cl. 4.

[53] In this regard, it is evidently clear that the second respondent has indeed failed to see to his obligation of ensuring that individual title is issued to Asiah. When the individual title to the said property was issued on 20 November 2008, it was in the first respondent's name, contrary to what was agreed upon in the SPA. Recognising that breach, the second respondent in fact took steps towards ensuring that it be transferred to Asiah, after she had paid for survey and the like. Yet, despite Asiah making such further payments, the title was not issued to her.

[54] It is in this respect that the second respondent is in breach of the SPA. The learned judge failed to appreciate that this was what Asiah and thereby the appellant's claim was about. Actually, the learned judge did not even address his mind to this elementary fact and this is regrettable as it was fundamental to the claim. Again, had this been done as the learned judge was obliged to, a similarly circumstanced court would reasonably have concluded that the claim was clearly proved against the second respondent.

[55] The factual matrix in the instant appeal is different from *Ngan & Ngan Holdings* (*supra*) and *Subramaniam NS Dhurai* (*supra*) where it was the sufficiency of title that was under scrutiny; that what was transferred was less than what was promised. As pointed out, that is not the nature of the claim nor were those the facts.

[56] Since there is certainty in the subject matter of the SPA, that it is the second respondent's interests or entitlement to the said property as defined and delineated in the layout plan attached to the SPA (in any case not in dispute save for the argument that formal title had not been issued), the second respondent holds his entitlement to the estate in relation to the said property in trust for Asiah. Following *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381; [2009] 6 MLJ 751; *Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd* [1996] 2 CLJ 561; [1996] 2 MLJ 12; *Tan Ong Ban v. Teoh Kim Heng* [2016] 3 CLJ 193; and *He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal* [2020] 7 CLJ 271, Asiah acquired beneficial interest in the said property when she fully paid for the said property while the second respondent holds the said property in trust for her.

[57] This is further reason why the learned judge was plainly wrong in dismissing the claim against the second respondent.

[58] The second respondent admitted to the existence of the SPA and his obligations at the trial, claiming that he acted at all times on behalf of the first respondent. The second respondent was a director of the first respondent. While that may only be from 2008 to 2014, the evidence clearly showed that Asiah frequently approached him together with the appellant to inquire about title to the said property.

[59] The acknowledgement, both tacit and overt of the first respondent, and in particular, the correspondence exchanged between solicitors acting for the respective parties at the material time more than sufficiently indicate the ratification, acceptance and acknowledgment of the SPA and the obligations of the second respondent as those of the first respondent. Since the first respondent was registered as owner of the said property under these circumstances, it is plain that it holds the said property in trust for Asiah who had paid in full for such purchase and the first respondent is obliged to fulfil the terms of the SPA and ensure that title is issued to Asiah, especially since the purchase price had long been settled in full.

[60] The learned judge had rejected the claim under bare trustee/ constructive trust on the ground that it was not pleaded. Having perused the statement of claim, it is clear that paras. 13 and 14 in particular allude to that plea. The finding of the learned judge is thus plainly in error.

[61] The first respondent who was represented by Lee Ban Heng, gave evidence which were not in the least helpful. He bought shares in the first respondent for over RM10 million but was unable to tell from whom he had bought the shares. He was unable to tell whether the shares were from Syed Ali or any of the vendors of the SPA, including the second respondent. In fact, he did not even know the second respondent. His testimony consisted of denials, no knowledge or lack of awareness on various critical matters including letters written by its solicitors.

[62] Asiah's entitlement to the said property is reflected in her entry and possession of the said property, built upon it and stayed at the said property from the time of the SPA till to date. The second respondent and for that matter, neither the first respondent or even Kheng Hup Co Ltd ever sought to displace, evict or challenge Asiah/appellant's right to be on the said property.

[63] In the circumstances, the first respondent was clearly in breach of the trust when it failed to ensure that individual title was issued to Asiah.

[64] On the limitation point, I am also not in agreement with the High Court. Since the breach of cl. 4 of the SPA occurred when individual title was issued to the first respondent instead of to Asiah, it is at that point that

the breach occurred and the cause of action accrued. Asiah's claim was filed in April 2015, clearly within the 12-year limitation period. The learned judge was thus also in error in this respect.

Conclusion

[65] For the reasons stated above, I agree with the submissions of learned counsel for the appellant and I would allow the appeal, set aside the decision and order of the High Court and grant the orders as prayed for in para. 23(1) and (2) together with costs of RM25,000 from each respondent subject to allocator.

[66] For clarity, the orders granted to the plaintiff as referred to at para. 23(1) of the statement of claim shall refer to Asiah binti Yahya.

[67] Finally, I have not made an order for damages since the primary relief is to complete the SPA and with the fresh evidence allowed. There is however incontrovertible evidence led by PW1, the land valuer who assessed the value of the said property to be around RM270,000. An appropriate amount of damages in the sum of RM300,000 together with interest at 5% per annum from the date of the High Court decision to the date of realisation would otherwise have been ordered.

[68] My learned sister Has Zanah Mehat JCA has read the draft of these grounds and have agreed with the grounds.

Rhodzariah Bujang JCA (dissenting in part):

[69] The appellant in this appeal is the representative of the estate of her late mother, Asiah binti Yahya ("the deceased"), who prior to her demise on 8 July 2016 had filed a suit in the High Court of Johor Bahru to assert her ownership over a piece of land described as Grant 316383, Lot 29654 ("the said lot"). Although at the time of the filing of the suit the said lot was registered in the first respondent's name but she had bought it from the second respondent and three others ("the co-vendors") through their attorney, Syed Ali bin Mohamad Al-Attas *vide* a sale and purchase agreement dated 8 October 1967 ("the 1967 agreement"). The other three co-vendors were Syed Jaafar bin Alwee, Syed Yahya bin Junid and Tengku Othman bin Abdullah. The said lot was then described as Private Lot 452 and a plan delineating its boundary was attached to the 1967 agreement. After a full trial, the learned Judicial Commissioner ("JC") dismissed the claim, which decision I have decided to set aside in part after hearing both parties' submissions in the appeal against the said decision. Before going into my full reasons for doing so, I would lay out further and in brief the background facts representing the dispute between the parties.

Background Facts

[70] The undisputed evidence led at the trial was that the said lot, at the time of the 1967 agreement formed part of a bigger parcel of land held under a certificate of title described as No. 17421, Lot 4648, Mukim Plentong, Johor Bahru ("the master title"). It was also at that material time registered in the name of Kheng Hup Co Ltd ("Kheng Hup"). On 18 May 1968, the first respondent acquired the said land from Kheng Hup. That master title was only sub-divided on 29 March 2000 and the said lot was one of the sub-divided portions of the land. It was registered in the first respondent's name on 20 November 2008. It is clear from the above facts that when the 1967 agreement was entered into by the respective parties, the land and therefore the said lot has yet to be registered in the name of the first respondent.

[71] The appellant at the trial adduced evidence that the deceased had constructed a single-storey house on the said lot and even paid quit rent for it until December 2015. The appellant contended that the respondents have acknowledged the deceased's proprietary interest over the land *vide* a letter from the first respondent's solicitor dated 8 December 2010, which month is wrongly stated for it should be September and not December 2010 (see p. 368 of the appeal record vol. 2). In this letter the first respondent promised to transfer the said lot to her but subject to the conditions stated therein, that is, *inter alia*, the payment of quit rent for 1972 to 2000, apportioned survey fees of RM586.50 and a written undertaking to pay the arrears of assessment rates for the said lot. That promise was obviously reneged. *Vide* a letter dated 21 February 2011 (p. 370 of the same vol. 2) from the deceased's then solicitor, receipts for, *inter alia*, assessment fees for second half of 2010 and quit rent for 2009 as well as the survey fee were sent to the first respondent's solicitor. Further correspondences on the matter between both solicitors are reproduced at pp. 372 to 381 of the same vol. 2 including the final one from the deceased's new solicitor notifying the second respondent of her intention to commence legal proceeding against him.

[72] The deceased contended that the failure of the respondents to transfer the said lot to her, given the undisputed fact that the purchase price had been paid in full, amounts to a breach of trust and a fraudulent conduct on their part. She therefore prayed in the statement of claim for multiple reliefs to assert her ownership over the land including a declaration that both respondents held the said lot in trust for her and for the first respondent to transfer the said lot to her.

[73] The first respondent's primary defence is that it was not aware of and was not a party to the 1967 agreement and as a registered proprietor of the said lot, its title is indefeasible under s. 340 of the National Land Code ("NLC"). That of the second respondent is basically to deny the sale of the said lot to the deceased for at that material time the land was still under a

A master title and not sub-divided yet and contrary to her allegation, he was not aware of the construction of her house on the said lot. However, the second respondent admitted that as the first respondent's director he did promise and agreed on behalf of the first respondent to transfer the said lot to her. Nevertheless, the allegation of breach of trust was denied by him and
B he also questioned why the deceased did not sue the other co-vendors named in the 1967 agreement.

Judgment Of The Learned JC

[74] In His Lordship's grounds of judgment, the following summary are his
C reasons for dismissing the claim and not granting the specific performance prayed for by the appellant:

(i) Given that the substitution of the appellant as the plaintiff in the suit had been made *vide* an *ex parte* order dated 30 January 2018, the respondents' respective applications to, *inter alia*, set aside the said
D order which were withdrawn by them and the appellant's application to amend her statement of claim which was dismissed by the court, there exist a radical departure in the pleadings and the appellant therefore failed to disclose any valid cause of action against the respondents. That failure to amend the statement of claim is fatal to
E the appellant because parties are bound by their pleadings. One of the obvious contradictions is the reference to the signatory to the agreement which is not the appellant but the deceased.

(ii) The first respondent was not the signatory to the 1967 agreement but the second respondent and the co-vendors were. Therefore, it was null
F and void against the first respondent who was not privy to the said agreement for at that material date, the land was not yet subdivided and was held under the master title in Kheng Hup's name.

(iii) The second respondent was never the registered proprietor of the said lot and therefore had no trust relationship with the deceased. Given
G that the transfer to the first respondent by Kheng Hup was only done seven months after the execution of the 1967 agreement, the second respondent and the co-vendors had no right under the law to effect the sale based on the principle of *nemo dat quod non habet* which is that no person can give a better title then he had.

H (iv) Proprietary estoppel does not apply in this case to the first respondent as it never entered into the 1967 agreement or any trust deed with the deceased and could not have made any assurance to transfer the said lot to her.

I (v) There is no evidence that full payment of the purchase price has been made because, *inter alia*, the maker and attesting witnesses for the 1967 agreement were not called to give evidence and the receipts produced

were all not in the first defendant's name. Even if full payment had been made on the said lot by the deceased, that does not make the first respondent a bare trustee of the said lot as there was no evidence that the first respondent had used the said purchase money to acquire the said lot from Kheng Hup. Since the said lot was not trust property, the issue of fraud or breach of trust on the part of the second respondent does not arise.

(vi) The issue of constructive trust was not pleaded so it could not be raised. The agreement was a conditional agreement as provided in cl. 1 of the same, *to wit*, "... subject to the following special conditions and the conditions of sale by Public Auction known as "the Johore Condition of Sale" so far as the same are applicable to a sale by private treaty and are not varied by or inconsistent with the special conditions herein". and cl. 4 provides that a deed of assignment and an irrevocable power of attorney must be executed by the parties in the event that the purchase price had been paid but a new document of title had not been issued. No such instruments have been executed.

(vii) In respect of the first respondent's solicitor's letter dated 8 October 2010 which was pleaded as evidence of a promise to transfer of the said lot to the deceased, no such letter was produced – only a letter dated 8 December 2010 (at p. 368, vol. 2 of the appeal record) but that letter did not make such a promise as it only said:

> We are instructed that you have negotiated with our clients to transfer ownership of the said property to you on condition that ...

Other subsequent correspondences did not show such an agreement to transfer as alleged which referred to the deceased as a "purported purchaser".

(viii) The claim being a contractual one, it was time-barred for it was only filed in 2015 which was 40 years late and not within the six years period from the time the cause of action arose as provided under s. 6(1) of the Limitation Act 1953. The High Court decision in *Abdul Rahim Sinon v. Pembangunan Tanah Dan Perumahan Sdn Bhd & Anor* [2016] 1 LNS 1079 although was in respect of the same master title and also against the first respondent, is not binding and is distinguishable on the facts, that is:

(a) the trial was without the participation of first respondent;

(b) Kheng Hup's prior ownership of the land and its subsequent transfer to the first respondent were not raised at all; and

(c) the principle of *nemo dat quod non habet* was not raised whilst that of constructive trust was pleaded.

A

The Appeal

[75] The starting point in my consideration of this appeal is the *locus standi* of the appellant. As shown in the intitulement of the appeal and the writ and statement of claim in the High Court, the appellant is stated as "suing as personal representative of the estate of Asiah binti Yahya" by reason of an
B *ex parte* order granted by the learned JC. It is not disputed however that there was no letter of administration or grant of probate issued to the appellant to administer the estate of the deceased. What she produced at the trial was an agreement dated 24 April 2016 titled perjanjian hibah executed by the deceased in the appellant's favour less than two months before her demise
C (at pp. 418-420 of the appeal record vol. 2) and which agreement was prepared by a Syarie lawyer, Azhar bin Mohamed (PW4). However, in view of the objection raised by the respondents' counsel at the trial, the said agreement was only identified but not marked as an exhibit by the learned JC. The grounds of the objections were manifold, that is, both factual and
D legal and one of which was that being an instrument executed under Islamic law, the Syariah Court must pronounce on its validity first. To answer this contention, first and foremost I would refer to O. 15 r. 7 of the Rules of Court 2012 which allows the substitution of a person upon the demise of a party to the proceedings and therefore upon such an order being made and unless
E it is set aside, the *locus* of the substituted person as a party to the proceeding is confirmed. That is the position of the appellant here.

[76] In respect of the Islamic law argument, the case of *Latifah Mat Zin v. Rosmawati Sharibun & Anor* [2006] 3 CLJ 207 was cited by the second respondent's counsel in support of that contention. With respect, I do not
F agree with learned counsel's submission that the facts in the cited case are in all fours with ours here. There the dispute between the parties were over the monies of the deceased which each of the parties claimed to be theirs – the appellant alleging that it was a gift whereas the respondents claimed it to be part of the deceased's estate and for which they were entitled to. This
G court held that given that the subject matter of the dispute was an *inter vivos* gift, that is hibah, therefore the jurisdiction to determine it lies with the Syariah Court and not the civil court. In this case before us, although the respondent objected to the admissibility of the agreement as evidence at the trial it is not between two competing claimants or beneficiaries to the property of the deceased which necessitates a determination by the Syariah
H Court on the legality of it, being one vested with the jurisdiction to do so. Our concern is purely on the authenticity of the said agreement so as to be satisfied that the appellant has the *locus standi* to step into the deceased's shoes as a litigant in the suit. Since the maker of the agreement who was also a co-witness to it, that is PW4, had come forward to tender the agreement, the
I probability that the agreement being made had been proven and it should

have been admitted as an exhibit at the trial. With that agreement before the court, there is therefore evidence that the appellant had a beneficial interest in the property and the statement of claim must be amended to reflect that she was, by virtue of the *ex parte* order now a party to the action in place of the deceased. This course of action is tenable on the authority of the Federal Court as decided in *Ooi Jim & Anor v. Ai Eit & Ors* [1974] 1 LNS 108; [1977] 2 MLJ 105 which was followed in *Al Rashidy Kassim & Ors v. Rosman Roslan* [2007] 3 CLJ 361; [2007] 4 MLJ 297, another Federal Court decision. The apex court in these cited cases held that the beneficiaries of the estate of a deceased have the *locus standi* to seek declaratory reliefs as prayed in the statement of claim without first obtaining a letter of administration to do so and that the need to obtain the letter of administration would only arise when the said beneficiaries want to claim a share in the estate of the deceased.

[77] It must again be reiterated that the appellant did file an application to amend the writ of summons and statement of claim by the appellant but as alluded to earlier, that application was disallowed by the learned JC and there was no appeal filed against that decision. Unfortunately, that application for amendment of the writ of summons and statement of claim was also not included in the appeal record but I gather from the draft amended writ of statement of claim which is exh. A to Part C of the supplementary appeal record vol. 3 that it was basically to substitute the word "plaintiff" in the said pleading to that of the "deceased", to plead the "perjanjian hibah", in respect of prayer 6 of the statement of claim to substitute the deceased's name to that of the appellant and to add in prayer 8 special damages of RM270,000. No reasons were canvassed in the learned JC's judgment for the rejection of the said application for amendment and since it was not allowed, with respect to His Lordship, the radical difference in the evidence and the pleading raised by him pertaining to the reference as to who is the plaintiff was not fairly and should not even be made against the appellant. This I say because the said particular amendment on the substitution of the parties should have been allowed given the *ex parte* order to substitute the appellant as the plaintiff in the intitulement of the action. In fact, as pointed out by learned counsel for the appellant before us, the Federal Court in *Karuppannan Ramasamy & Anor v. Elizabeth Jeevamalar Ponnampalam & Ors; Sundaram Marappa Goundan & Anor (Interveners); Raya Realti (Third Party) & Another Appeal* [2009] 4 CLJ 225; [2010] 1 MLJ 156 has held in para. 37 of the judgment that:

> A defect in a pleading that does not catch the other party by surprise or embarrass or prejudice him ought not to bring harm to the case of the party pleading.

Thus, based on the principles of law stated by the apex court in *Ooi Jim*'s case (*supra*) and *Al Rashidy*'s case (*supra*), if I allow the appellant's appeal, the reliefs granted as prayed in the statement of claim would still be in the deceased's name and it would be up to the appellant to take further action to enforce the hibah agreement.

Non-Admission Of Relevant Documentary Evidence

[78] Another procedural point raised before us was the non-admission of certain documentary evidence intended to be used by the appellant at the trial. This evidence, as listed by learned counsel for the appellant in his written submission are as follows:

(i) The first respondent's letter dated 29 November 1971 to the deceased informing her that the said lot have been surveyed, surrendering it to the deceased and requesting her to sign the attached form.

(ii) The first respondent's official receipt dated 6 December 1971 acknowledging the deceased's payment of RM145 for the premium charges and quit rent for the said lot.

(ii) The first respondent's letter dated 2 April 1974 informing the deceased that the said lot and others too will be acquired by the Government to build a campus for tertiary education.

(iv) The first respondent's letter dated 11 October 1983 informing the deceased that the issue of sub-division and issuance of individual grants for the lots on the land are being actively pursued and negotiated by the first respondent with the relevant authorities and requesting for payment of RM586.50 as her share of the survey fees.

[79] I cannot fault the learned JC's refusal to admit the said document as exhibits despite being referred to them during the trial because according to the appellant's counsel, as recorded at p. 222 of the appeal record vol. 2, these were only obtained the day before their production in court and that the appellant initially had no intention to produce them at the trial. Obviously, these documents were not part of those discovered for the trial and was therefore rightly rejected by His Lordship as the basic principle in a civil trial is that there should not be any element of surprise in the said trial. However, there is another dimension to that principle in this case because as can be seen from the notes of evidence from pp. 217, line 34 to line 13 of p. 222 of vol. 1 of the appeal record, the appellant was allowed in re-examination to read the contents of the documents which were ruled inadmissible by His Lordship. Most pertinent to the appellant's case are the first respondent's three letters, the first dated 29 November 1971 (the content is reproduced at p. 219), the second dated 2 April 1974 (the content is reproduced at line 30 of p. 220 to line 1 of p. 221) and the third dated 2 April 1974 (the content is reproduced at p. 221, line 27 to line 12 of

p. 222). The above-mentioned paginations are from the same vol. 1 of appeal record. The learned JC then said at p. 223, line 20 to 24 of the same vol. 1 of the appeal record as follows:

> YA Tak apa, sekarang ini macam ini keterangan dokumen itu saya tak akan benarkan untuk di fotostat, untuk dijadikan exhibit ke apa, nanti sebab saksi dah rujuk, kita tengah record. Remain as it is, as oral evidence, but documentary, tak boleh sebab saya dah tutup dalam kes ini Plaintif.

[80] Now s. 63(e) of the Evidence Act 1950 actually allows for such oral evidence to be given in respect of a document and the following s. 65(1)(a)-(g) laid out the circumstances when such secondary evidence "maybe" admissible. Given that the said section uses the word "maybe" the said circumstances are not mandatory. In the given circumstances of this case and as recorded by the learned JC, the said letters were raised in re-examination following the cross-examination of the appellant by the first respondent's counsel (see p. 220, line 11-14 of the same vol. 1 of the appeal record). Thus, in my view it is safe for the court to take into account and to consider the aforesaid oral evidence of the appellant for this reason and another one which I will mention later in my judgment.

Non-Pleaded Cause Of Action

[81] As stated earlier, the learned JC made a finding that constructive trust was not pleaded but with respect, as rightly pointed out to us by learned counsel for the appellant, it was, though not in all instances with the exact word "constructive" in it as shown below in para. 14 of the statement of claim and para. 19 of the reply to the defence, respectively:

> 14. Plaintif telah menjelaskan bayaran penuh harga pembelian hartanah tersebut sebanyak RM2,400.00 semasa menandatangani perjanjian tersebut. Selepas pembayaran tersebut, Defendan Kedua, Syed Jaffar bin Alwee, Syed Yahya bin Junid dan Tengku Othman bin Abdullah sebagai pihak penjual sama ada dengan sendirinya atau melalui Defendan Pertama memegang hartanah tersebut sebagai pemegang amanah sahaja ('bare trustee') untuk faedah, keuntungan dan kepentingan Plaintif semata-mata sementara menanti urusan pindahmilik kepada Plaintif disempurnakan.
>
> 19. Dalam apa keadaan sekalipun, Defendan Pertama adalah 'Constructive Trustee' kepada Plaintif terhadap hartanah tersebut sepertimana diterangkan di dalam pernyataan tuntutan dan jawapan disini.

Although in the above-mentioned para. 14, the word "constructive" is absent but reading the said paragraph as a whole, it cannot escape the readers' conclusion that it is that particular trust which is being raised there.

[82] Having disposed off the procedural points raised against the learned JC's judgment, I would now deal with the substantive ones which the appellant contended should move us to allow her appeal. The first of that is whether the action was barred by limitation.

Limitation

[83] Learned counsel for the appellant submitted that his client's cause of action was not founded in contract but recovery of the land for which the Limitation Act 1953 provides a limitation period of 12 years from when the cause of action accrued. I would agree that the cause of action here lies in recovery of land because although the deceased was never dispossessed of the land and therefore the issue of recovering its physical possession does not arise, but she was dispossessed of its legal ownership all these years. I also agree with learned counsel for the appellant that the time when the cause of action arose is when the first respondent refused to transfer the title to the lot to her and as held in the Federal Court's case of *Ahmad Hussin v. Hjh Mek Hj Hussain* [1972] 1 LNS 3; [1973] 1 MLJ 18, the right of action accrued not from the date of the sale but when it was asserted and infringed by the opposing party. Here the clear evidence, from the correspondences I had referred to earlier on the active negotiations pertaining to the transfer of the lot to the deceased and the inaction of the first respondent as evidenced by the last letter of the first respondent's then solicitor dated 17 October 2011 (at p. 382 of appeal record vol. 2) moves me to find that the cause of action arose at the earliest by the date of the said letter, if not the letter dated 5 April 2014 from the appellant's present solicitor, threatening legal action against both the respondents though it was addressed to the first respondent only. For clarity, the first mentioned letter is reproduced in full below:

> Our Ref: RL/L/P. 023/2011 17th October, 2011
> Your Ref: KCL/xt/C6142/1101
>
> Messrs Leng & Co
> Advocates & Solicitors
> Johor Bahru fax/by hand
> Dear Sirs
>
> **Re: Property: HS (D) 301991 Lot 29357 (Private Lot 452)**
> **Mukim Plentong**
> **("the said Property")**
>
> **Purported Purchaser: Asiah Bte Yahya**
>
> We refer to your letter of 15.10.2011.
>
> We have not received our clients' instructions on the matter and therefore unable to respond to your demands. Your statement that "the matter has been outstanding for more than 4 months" seems to connote that we have caused the delay, and we take exceptions thereto.

Your UOB cheque for RM7,714.50 is still held in abeyance. We shall revert to you if we are further instructed on the matter.

Yours faithfully

c.c. clients,

(A copy of solicitors' letter under reply is enclosed herewith for your further instructions to us, if any).

The 12 years limitation period thus begins from that aforesaid date as emphasised by me above and since the action was filed in 2015, it was well within the limitation period provided by the law.

Constructive Trust

[84] The next material issue I would consider is whether constructive trust have been proven against the two respondents. To answer that question, the evidence that I have borne in mind is the undisputed fact that at the time of the execution of the 1967 agreement, none of the respondents were the registered owner of the lot either singularly or jointly which had moved the learned JC to apply the *nemo dat non quod non habet* rule. However, as against the first respondent, both the documentary and oral evidence of the second respondent have proven that it had acknowledged the deceased's proprietary interest on the lot until a change in the ownership and management of the first respondent in 2014. It must be emphasised that the second respondent was the first respondent's director from 2006 until 2014 and the individual titles on the land were only issued on 2 March 2015.

[85] The evidence of the second respondent that prior to the aforesaid change and when he was still in the management of first respondent's company it has acknowledged the proprietary interest of the deceased is very clear and unequivocal, even if I were to disregard the documentary evidence which had been ruled inadmissible by the learned JC earlier. This he said even in examination-in-chief at paras. 9 to 11 of his witness statement which appears at pp. 67 to 68 of the appeal record vol. 1 as follows:

9. Q: Sepanjang masa kamu bertindak sebagai pengarah Defendan Pe-1, apakah pendudukan Defendan Pe-1 tentang Perjanjian bertarikh 8.10.1967 yang telah dimasuki oleh wakil kuasa tersebut untuk menjualkan Private Lot 452 kepada Plaintif?

   A: Sepanjang masa saya bertindak sebagai pengarah Defendan Pe-1, Defendan Pe-1 memang bersetuju untuk memenuhi Perjanjian bertarikh 8.10.1967 yang telah dimasuki oleh wakil kuasa untuk menjual Private Lot 452 kepada Plaintif. Defendan Pe-1 rela memberikan pindahmilik asalkan kehendakan-kehendakan tertentu dipenuhi.

10. Q: Adakah apa-apa langkah diambil berkenaan pindahmilik tanah yang dibeli oleh Plaintif:

A: Sebenarnya, sekitar November 2009, saya selaku pengarah Defendan Pe-1 telah berbincang dengan wakil Plaintif berkenaan urusan pindahmilik tanah yang dibeli oleh Plaintif dan pada masa itu, Defendan Pe-1 menghendakkan Plaintif membayar sebahagian fi jurukur sebagai salah suatu syarat untuk pindahmilik. Plaintif telah pun membayar sejumlah RM1,600 terhadap fi tersebut dan resit-resit untuk bayaran berkenaan boleh dilihat di m.s. 28, IDP, Bhg. 2.

11. Q: Adakah langkah selanjutnya diambil?

A: Selanjutnya, pada sekitar Disember 2010, Defendan Pe-1 telah mengarahkan peguamcaranya, Tet. Jackson & Mascorale, Peguambela & Peguamcara, Johor Bahru, untuk menghubungi Plaintif demi menyiapkan urusan pindahmilik. Saya tidak tahu apa yang berlaku kepada urusan itu sehingga saya meletak jawatan pengarah Defendan Pe-1 dalam 2014 apabila Defendan Pe-1 dijual dan dipindahmilik kepada pemegang syer yang kini.

[86] The second respondent confirmed the evidence above in the answers he gave to the questions posed to him when he was asked the following questions in cross-examination at p. 320 of the appeal record vol. 2.

BH: Syarikat Defendan Pertama ini, tidak pernah pertikaikan tuntutan pembeli-pembeli tersebut.

Husain: Tak.

BH: Khususnya kes ini, dia sebenarnya hanya memang ada niat nak buat pindahmilik?

Husain: Ya.

[87] There was therefore unequivocal and clear admission by him that the said lot had been sold to the deceased, of her proprietary interest in the land and that to facilitate the transfer of the title to her, the said letter from the first respondent's then solicitor dated 8 December 2010 was issued to the deceased listing six conditions for the same. What is more, there is a letter dated 30 May 2011 (at pp. 376-378 of the appeal record vol. 2), from the deceased's then solicitor stating that the aforesaid conditions have been fulfilled. Of course, *vide* a letter dated 13 March 2015 and 25 March 2015, respectively, both the then solicitors acting for the deceased and the first respondent informed each other that they were no longer acting for their respective clients but the disengagement of their services does not impugn the clear acknowledgement of the fulfillment of the said conditions and accordingly, the deceased's proprietary interest over the said lot.

[88] Equally important is the admission of the second respondent to confirm that the letters which had been ruled inadmissible had been issued, which I again reiterate and emphasise, is evidence of an acknowledgement of the deceased's proprietary interest over the said lot. In particular his evidence at pp. 328-329 of the same vol. 2 of the appeal record reads as follows:

BH: Dan juga ada satu borang PTP/1. Borang ini dia, Pembangunan Tanah dan Perumahan Sdn Bhd. Dia 'Pemberitahu rancangan tanah Saujana Lot 452/B, kepada Cik Asiah. Saya bacakan 'Dengan gembiranya dimaklumkan iaitu lot tanah yang tersebut di atas Tuan Puan beli daripada kami telah siap diberi tanda oleh pihak jurukur kami. Dari itu, dengan suka citanya, kami serahkan tanah tersebut kepada Tuan Puan dan bolehlah pihak Tuan Puan memasuki dan mentadbir tanah tersebut dari tarikh Tuan Puan menandatangani borang yang disertakan ini.

HUSAIN: Ya.

BH: Tuan Syed sahkan memang ada Defendan Pertama keluarkan?

HUSAIN: Ya.

BH: Ok. Jadi Tuan Syed boleh sahkan sebenarnya Defendan Pertama ini ada menjual tanah tersebut kepada Plaintif?

HUSAIN: Tanah yang mana? Lot?

BH: Ini, ini, memang tanah ini memang dah dijual kepada Plaintif lah?

HUSAIN: Ya, Lot 450 itu ada.

BH: Memang dah dijual?

HUSAIN: Ya, ada, dengan Asiah.

In my view, given the second respondent's high position in the first respondent at that material time and even without the physical support of the documentary evidence at the trial, his evidence which was in favour of the appellant should have been considered, (but with respect it was not) and accepted by the court. The above admission made by the second respondent is the additional reason why I said earlier that the appellant's evidence on the said letters in particular that dated 29 November 1971 which content was read out by the second respondent, should have been accepted by the court because in essence, he confirmed in his evidence as reproduced above the existence and content of the said letter.

[89] It is pertinent now to refer to the law on constructive trust which has been explained by the Federal Court in *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381. Gopal Sri Ram FCJ in delivering the judgment of the court listed the circumstances in which such a trust arises at para. 20 as follows:

A [20] A constructive trust is imposed by law irrespective of the intention of the parties. And it is imposed only in certain circumstances. Two examples readily available (apart from the facts of this case and those illustrations provided by Millet LJ in *Paragon Finance plc v. DB Thakerar & Co*) are (i) *where there is a specifically enforceable contract for the sale of property (moveable or immovable), the vendor holds the property on a constructive trust for*
B *the purchaser:* see, *Wong Siew Choong Sdn Bhd v. Anvest Corporation Sdn Bhd* [2002] 3 CLJ 409; and (ii) where a gift made as a *donatio mortis causa* fails, the intended beneficiary of the gift holds it in trust for the donor. *As may be seen, the vendor in the first illustration* and the purportedly dying donor or the beneficiary in the second *did not create any trust. Nor did they intend to*
C *do so. What equity does in those circumstances is to fasten upon the conscience of the holder of the property a trust in favour of another in respect of the whole or a part thereof.* (emphasis added)

[90] Earlier, at para. 15, what was quoted by His Lordship is equally pertinent and provides a convincing argument in favour of the appellant:

D [15] In *Paragon Finance plc v. DB Thakerar & Co* [1999] 1 All ER 400, Millet LJ (later Lord Millett) explained the concept of a constructive trust in terms that is difficult to improve:

> *A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property (usually but*
E *not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another.* In the first class of case (and this is the class with which we are presently concerned), however, the constructive trustee really is a trustee. He does not receive the trust property in his own right but by a transaction by which both parties intend to create a trust from the outset and
F which is not impugned by the plaintiff. His possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and his subsequent appropriation of the property to his own use is a breach of that trust. Well known examples of such a constructive trust are *McCormick v. Grogan* [1869] 4 App. Cas. 82 (a case of a secret trust) and *Rochefoucald v.*
G *Boustead* [1897] 1 Ch. 196 (where the defendant agreed to buy property for the plaintiff but the trust was imperfectly recorded). *Pallant v. Morgan* [1953] Ch. 43 (where the defendant sought to keep for himself property which the plaintiff trusted him to buy for both parties) is another. In these cases the plaintiff does not impugn the transaction by which the defendant obtained control
H of the property. He alleges that the circumstances in which the defendant obtained control make it unconscionable from him thereafter to assert a beneficial interest in the property.
(emphasis added)

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[91] Thus, as against the first respondent, the evidence, the law and the latter's application to the former is clear and it is to its detriment. It is even more so when the aforesaid evidence supports not just the existence of a constructive trust but also that of estoppel by conduct. I say this because given all that the first respondent had done, prior to the change in its constitution in 2014 in acknowledging and taking steps to facilitate the transfer of the lot to the deceased, it must consequentially be estopped by its own action from denying the deceased's proprietary right over the lot. A clear authority which justifies my invocation of this doctrine of estoppel here is the Federal Court's decision in *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283; [1995] 3 MLJ 331 where it was held that this doctrine is flexible principle which the court can resort to achieve justice, that it need not even be specifically pleaded as long as the fact giving rise to it are and it is in the interest of justice to do so. Obviously to me, the invocation of the said doctrine would meet the end of justice in this case, given the clear acknowledgement by the first respondent of the deceased's proprietary interest in the said lot. The fact that there was a change in the ownership of the first respondent is to me immaterial because the trite principle in company law is that a body incorporated is a legal, *albeit* an artificial person. Therefore, like any living person the first respondent should not be allowed to approbate and reprobate its action. As for the argument of the first respondent that there was no resolution from first respondent to approve the sale, the clear evidence from the second respondent at the trial was its acknowledgement of the sale.

Furthermore, it is a trite principle of company law established in *Royal British Bank v. Turquand* [1856] 119 ER 886 which has been adopted by our court (see, for instance *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793; [1998] 1 MLJ 465) that an outsider dealing with a company in good faith is entitled to assume that acts within its constitution and powers have been regularly performed and are not bound to inquire if they are otherwise. As for the further argument of the first respondent that the 1967 agreement's condition of sale as per para. 1 was not fulfilled, that is, that a deed of assignment and an irrevocable power of attorney were not executed, such an omission could not be raised against the deceased because these two documents were clearly stipulated in the 1967 agreement to be the responsibility of the vendors – not her's – so the non-fulfillment of the same could not be held against the deceased. The said clause reads:

> 4. Upon payment of the whole of the balance of the purchase price in manner aforesaid the Vendors shall execute in favour of the Purchaser/s or his/her/their nominee or nominees a proper and registerable transfer of the new document of title if then issued by the Land Office in respect of the said land but *in the event the new document of title shall not have been issued to the Vendors by the Government of the State of Johore in respect of the said land at the time when all the instalments have been paid by the Purchaser/s the*

> *Vendors shall in such case execute in favour of the Purchaser/s a Deed of Assignment and Irrevocable Power of Attorney whereby the Vendors shall transfer and assign all their rights title and interest in the said land to the Purchaser/s* and also thereby the Vendors shall appoint and constitute the Purchaser/s their true and lawful attorney/s to deal with the said land as if he/she/they were the absolute owner/s thereof pending the issue of a new document of title and in particular to execute and perfect a transfer of the said land and effect the registration thereof in accordance with the provisions of the National Land Code when the new document of title in respect of the said land is issued by the Government of the State of Johore. Such transfer or Deed of Assignment and Irrevocable Power of Attorney shall be prepared by and at the office of Messrs. Goh Bin Lay & Co., Advocates & Solicitors of No. 82-C, Jalan Ah Fook, Johore Bahru. (emphasis added)

[92] Furthermore, and with respect to the learned JC's finding, there is evidence of full payment of the purchase price of the said lot from the 1967 agreement itself which states at cl. 2 as follows:

> The Vendors hereby acknowledge receipt of the sum of Dollars Two Thousand Four Hundred Fifty only ($2,450.00) paid by the purchaser/s on or before the execution of this agreement in full payment towards the purchase price of the said land.

[93] The above view of mine in favour of the appellant against the first respondent is further strengthened by the fact that in all the years of the deceased's occupation of the said lot and more particularly after the individual title to the lot was issued, the first respondent never made any attempt to evict her from it but on the contrary had negotiated to effect the transfer of its title to her. This fact surely militates against their present stand not to follow through with the deal. The subsequent change of heart after the change in the ownership and management of the first respondent is in my view an unconscionable conduct which the court should not condone.

[94] However, I am unable to conclude the same against the second respondent for despite being named as a co-vendor in the 1967 agreement and a director of the first respondent during the relevant years as mentioned earlier, the plain and obvious fact is that at all material times, that is when the 1967 agreement was executed and when the action was filed in court, he was never the registered owner of the land. He was merely cited, together with his co-vendors, in the first recital of the said agreement as follows: "WHEREAS the vendors are entitled to all that piece of land …".

[95] The second respondent was even honest enough to give evidence, as quoted earlier, in favour of the appellant at the trial. Just by virtue of his position in the first respondent's company and being a named co-vendor to that 1967 agreement to sell the land which was not even his to begin with and one where he was never in possession of, constructive trust does not, in my view arise at all. This finding I believe I am bound to make when

considering that the appellant did not at the trial adduce any evidence as to how the second respondent and the other co-vendors came to be named as the vendors of the land or in other words, the circumstances which gave rise to their beneficial interest in the land as held in passages of *Takako Sakao*'s case (*supra*) which I had reproduced and emphasised earlier which also justifies the giving of the power of attorney to Syed Ali bin Mohamad Al-Attas to act for them in the transaction. In my view, the second respondent's admission in paras. 3 and 4 of his witness statements that at the time of execution of the 1967 agreement, that he and his co-vendors have not obtained the land under the master title and that he was just an employee of Syed Ali, by themselves and without more could not amount to such a circumstance which I have just alluded to above. In fact, what he said right after that, that is, he had no means to purchase the land fortified my view that on the face of the evidence the second respondent had no beneficial interest in the land at all when the 1967 agreement was executed. The learned JC was therefore right to invoke the principle of *nemo dat quod non habet* in his favour. Thus, unlike the case against first respondent, given that there is no satisfactory and sufficiency of evidence to pin his liability on the claim herein, I would agree that the claim against him should be dismissed.

[96] Lastly, for completeness I would just briefly state, although this was not even raised at the oral hearing before us that the allegation of fraud and misrepresentation levelled against the respondents in para. 19 of the statement of claim have not been proven against them. In actual fact the evidence of the earlier negotiation on effecting the transfer to the deceased shows a sincere intention to do the same. Accordingly, I would allow the appeal in part, in that the decision of the learned JC to dismiss the claim against the second respondent is affirmed but not that as against the first respondent.

Post-Hearing Matters

[97] Before pronouncing the reliefs to be granted against the first respondent, I would like to address these matters which in my view are pertinent to the said reliefs. In the intervening period after we finished hearing the respective submissions of learned counsel for both parties and before the delivery of our decisions in this appeal, we were apprised of the fact that the first respondent had been wound up on 13 July 2020 by the High Court of Penang. However, on 6 April 2012 the appellant was granted leave under s. 471(1) of the Companies Act 2016 by the High Court of Penang to proceed with the appeal before us.

[98] Prior to that but in the same intervening period as well, the appellant had, upon a directive given by us on 2 July 2020, filed an application on 7 August 2020, to adduce fresh evidence on the current status of the land to be considered in the appeal. That application was allowed. The said fresh

A evidence are the cause papers in respect of an application by way of Originating Summons No. JA-24NCVC-5998-10-2018 filed by Q Development Sdn Bhd ("Q Devt") against the appellant for *inter alia*, an order that a private caveat she lodged against the said lot be removed. Pertinent to the resolution of the appeal before us is the fact that the affidavit evidence tendered in that
B proceeding shows that the first respondent had transferred the said lot to Q Devt, which transfer was registered on 14 May 2018, ie, about two months prior to the delivery of the learned JC's decision on 16 July 2018. In view of the said transfer, as conceded by learned counsel for the appellant, the only relief that can be granted to the appellant, as against the first respondent is
C the declaration sought for in prayers 1 and 2 of the statement of claim but as I had stated earlier, the same would still be in the deceased's name.

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